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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;

and

Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area

CC Docket No. 96-149

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REPLY COMMENTS OF PACIFIC TELESIS GROUP

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SUMMARY

The purpose of the 1996 Act is to increase choices and lower prices for consumers. Some parties—those who fear competition with the BOCs—urge an over-regulatory approach that cannot be found in the Act. Congress established the safeguards it found necessary. The Commission should not bow to the anti-competitive, anti-consumer naysayers who seek in this proceeding what they could not get (for good reason) in legislation.

- ***Separation vs. integration.*** Congress struck a careful balance between the risk of cross-subsidy and the benefit of efficiency in the 1996 Act's separated affiliate requirements. Where the Act does not require separation, the Commission should not deprive consumers of the efficiencies of integration. Services that may be integrated include:
  - Telecommunications and information services authorized under the MFJ.
  - Incidental interLATA services.
  - Telemessaging services, whether intra- or interLATA.
  - Information services that do not have a BOC-bundled interLATA telecommunications transmission component, a communication that originates and terminates in different LATAs, *and* an end user interLATA benefit.
  - IntraLATA Internet access.
  - Electronic publishing not disseminated by means of the BOC's basic telephone service.

- ***Independent operations.*** Congress was clear and specific in detailing the separation requirements between the BOC and its interLATA affiliate.
  - It imposed *no* separation between the holding company, or any non-operating company affiliate, and the interLATA affiliate.
  - The Commission should not expand the phrase "operate independently" to require additional separation not required by the 1996 Act.
  - There is no statutory or policy justification to prohibit shared services, subject to the adequate safeguard of the affiliate transaction rules. Such a prohibition would deprive consumers of efficiently provided interLATA services.

- ***Nondiscrimination.*** Congress spelled out reasonable nondiscrimination safeguards in the 1996 Act. The Commission should not expand these requirements into impossible or unfair standards that would only prevent the BOCs from offering consumers the benefits of vigorous and effective competition.
  - "Nondiscrimination" does not require BOCs to provide services to others that it does not provide to its affiliate.
  - Nor does it prohibit a BOC from providing a service to its affiliate that others may not want.
  - The Commission's existing non-structural safeguards, combined with the 1996 Act's structural and non-structural requirements, are more than sufficient to implement the Act's non-discrimination provisions.
  - The privacy protections in the 1996 Act make it clear that—without discrimination—a BOC can provide CPNI to its affiliate with customer approval, and is not permitted to provide that information to others unless the customer authorizes it in writing.
  - The Commission should not regulate industry standard setting by condemning Bellcore standards or interfering with voluntary BOC attendance at standard setting forums.
  - Nondiscrimination in the timing of provisioning should be enforced by reasonable reporting of average service intervals.
  - The use of tariff rates for telephone exchange service and exchange access between a BOC and its interLATA affiliate assure nondiscrimination.

- ***Provision of interLATA facilities and services.*** The Act does not prohibit—and a policy favoring the rapid entry of new competitors in order to lower prices for consumers of interLATA services requires—that the BOC be able to provide facilities to these competitors, including its interLATA affiliate.
  - Prohibiting BOCs from providing "wholesale" facilities and services to interexchange carriers for interLATA services would give an egregiously anti-competitive advantage to the few existing large facilities-based carriers, keeping consumer prices high.
  - Official services networks may, if warranted by increased efficiency, be used to provide interLATA services and generate revenue that will benefit ratepayers.

- ***Joint marketing.*** Congress intended that consumers would be able to get "one stop shopping" from BOCs and their affiliates just as they can from other telecommunications companies. The 1996 Act clearly allows:
  - The interLATA affiliate to provide local service, with its own facilities or by resale.
  - The BOCs to market or sell their separate affiliates' services.
- ***Dominant/non-dominant classification.*** The only effect of classifying BOCs and their affiliates as dominant for in-region interLATA services would be to keep prices to consumers high because the tariff filing requirements would interfere with vigorous price competition. There is no legal or policy basis to classify BOCs as dominant.
  - The monopoly leveraging theory advanced by some parties is thoroughly discredited.
  - BOCs will have zero initial market share and zero market power.
  - Due to the pervasive unbundling and other requirements of the 1996 Act, as well as current Commission rules including price caps, the BOCs' ownership of local exchange facilities confers no market power in interLATA markets.
  - The BOCs will have no market power in international markets. Hypothetical arguments about possible arrangements between BOCs and foreign carriers should not delay BOC entry; they can be addressed in ongoing appropriate proceedings.
- ***Burden of proof.*** Any attempt to shift the burden of proof in complaint proceedings would be an illegal violation of the APA, with anti-competitive consequences.
- ***Mergers.*** Existing requirements are a sufficient safeguard against discrimination by BOCs involved in merger agreements. There is no need or justification under the 1996 Act to treat the regions as merged before a merger becomes final.

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REPLY COMMENTS OF PACIFIC TELESIS GROUP

Pacific Telesis Group ("PTG") hereby respectfully submits its reply comments in the above-captioned proceeding.

I. Introduction

The Commission intends, through this docket, "to protect subscribers" and "to protect competition." *NPRM,* ¶3. It does not plan to protect *competitors*. Yet this seems to be precisely what many supposedly pro-competitive commenters are urging. Major carriers, such as AT&T, MCI, and Sprint urge the Commission to handicap the Bell Operating Companies ("BOCs") as they enter interLATA markets. They seek to deprive the BOCs and their interLATA affiliates of efficiencies, such as sharing administrative services, which Congress clearly did not want to restrict. They urge uneven application of the joint marketing requirements, directly contradicting Congress's intent that BOCs and their affiliates should enjoy parity with other carriers in such vitally important matters as the ability to offer "one stop shopping." They recommend treating BOC affiliates as dominant for in-region, interLATA services, despite those affiliates' zero initial market share and pervasive regulation and unbundling of the local exchange. They would impose an illegal burden of proof on BOCs in complaint proceedings which could lead to regulatory blackmail.

These arguments are not pro-subscriber nor pro-competitive. They are naked attempts to preserve the comfortable status quo in interLATA competition, where a few major facilities-based carriers enjoy year after year of record profits. These carriers don't want the BOCs to compete. This is clear. Prices to subscribers might fall; consumer choice might expand. How would that benefit AT&T? Or MCI? Or Sprint?

Congress *did* want the BOCs to compete in interLATA markets. Congress wanted us to lower prices to subscribers through our efficiencies. Congress wanted us to market and sell our services aggressively and effectively. Congress wanted us to be treated fairly in Commission proceedings. In our Reply, we highlight the important issues where our future competitors and Congress disagree. We urge the Commission to follow Congress.

II. The Commission Should Reject Proposals that Would Broaden the Scope of §272 and Frustrate Congress's "Pro-Competitive, Deregulatory" Goals (¶¶ 31-54)

A. The Commission Should Reject Proposals To Require Separation Where Congress Allows Integration

<u>Prior authorized and incidental interLATA services</u>—MCI (p. 8), Sprint (p. 14), and CompTel (p. 10) are correct that §272 structural separation requirements do not apply to previously authorized telecommunications services. MCI, for instance, states that "it appears that previously authorized interLATA telecommunications services never have to comply with the separate affiliate requirements of §272."

TRA (pp. 9-10) takes the extreme position that prior authorized interLATA *telecommunications services* are not protected from §272 structural separation requirements. TRA's unjustified position is directly contrary to the §272(a)(2)(iii) exclusion of "previously authorized activities described in section 271(f)" from the interLATA telecommunications services for which separate affiliates are required. TRA's focus on interLATA CMRS is misplaced.[1] Section 271(g)(3) includes commercial mobile services as incidental interLATA services, and §272(a)(2)(B)(i) excludes those services from the separate affiliate requirements.

MCI (p. 9), Sprint (p. 14), and ITAA (p. 8) are wrong when they state that previously authorized or incidental interLATA *information services* must comply with separate affiliate requirements within one year. Their only basis for this argument is that §272(a)(2)(B), which excludes incidental interLATA services relates to "telecommunications services," not information services. Congress, however, did not limit that subsection to telecommunications services. Information services are included in both the previously authorized activities excluded from separate affiliate requirements by §272(a)(2)(B)(iii) and the incidental interLATA services excluded from those requirements by §272(2)(B)(i). For instance, the incidental interLATA services include "Internet services over dedicated facilities to or for elementary and secondary schools...." §271(g)(2). Internet services are enhanced or information services. As another example, incidental interLATA services include "other programming services" as well as the capability of interaction by subscribers. §271(g)(1)(A) and (B). Congress intended that "other programming service" would include "interactive services such as game channels and *information services* made available to subscribers by the cable operator, as well as *enhanced service*." Conference Report, p. 169 (emphasis added). The inclusion of information services within the exceptions from separate affiliate requirements for

[1] The FCC has recognized the need to allow BOCs to integrate PCS. *Amendment of the Commission's Rules to Establish New Personal Communications Services,* 8 FCC Rcd 7700, para. 126 (1993).

telecommunications services is reasonable here because, as §271(h) states, the incidental InterLATA services include incidental "interLATA transmissions." Incidental interLATA transmissions are common to both interLATA telecommunications and interLATA information services. Moreover, the MFJ Court had no unique rules for authorizing incidental interLATA information services as opposed to incidental interLATA telecommunications services and handled them both together.

For the same reasons, NCTA (pp. 2-7) and Time Warner (p. 4) are wrong to attempt to use §271(h) to apply §272 restrictions to BOC video services. Video services are included in the §271(g) list of incidental interLATA services that are excluded from separate affiliate requirements by §272(a)(2)(B)(i). In addition, application of §272 restrictions would prevent the BOC from providing integrated video services, contrary to Congress's intent under §651.

Avoiding restrictions on incidental interLATA services—MCI (p.11) is clearly wrong in its extreme recommendation that *structural separation* should be required for incidental interLATA services. By explicitly excluding these services from the requirements of §272, Congress expressed its intent to avoid these requirements. As it did with open video systems, the Commission should "adhere to Congress's intent and decline to impose a separate affiliate requirement here."[2] Moreover, for ten years under *Computer III,* the Commission has consistently found that regulations short of structural separation provide sufficient protection, while allowing the public the efficiency benefits of integration of BOC services.[3] Nothing has happened that could change these findings.

In addition, AT&T (p. 11) is wrong when it argues that the *nonstructural nondiscrimination obligations* of §§272(c) and (e) should apply to a BOC's integrated provision of incidental interLATA services. As we explained in our Comments (pp. 6-7),

[2] *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* CS Docket No. 96-46, FCC 96-249, *Second Report and Order,* released June 3, 1996, para. 249.

[3] *See, e.g., Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services,* CC Docket No. 95-20, 10 FCC Rcd 8360, para. 29 (1995) ("*CI-III Further Remand NPRM*").

no non-accounting "structural or nonstructural" safeguards are needed to ensure that BOC provision of incidental interLATA services does not harm ratepayers or competition. Price cap regulation, which divorces prices from regulated costs, or accounting safeguards provide adequate protection.

Merger agreements—AT&T (p. 15), Sprint (p. 15), Excel (p. 3), and CompTel (p. 12) are wrong that, pre-merger, the regions of those BOCs that have entered merger agreements should be considered a single "in-region" for purposes of §§271 and 272. Merger agreements fall apart for many reasons, and it makes no sense to treat these agreements as final until they are final. Moreover, merger agreements do not diminish the application of the §§271 and 272 separate affiliate and nondiscrimination requirements, or other existing nondiscrimination requirements, and they are sufficient to protect ratepayers and competition.

B. The Commission Should Reject Proposals that Would Require It To Ignore Its Decades of Experience with Enhanced Services

Definition of interLATA information services—AT&T (p. 14) is correct that "an information service is not interLATA merely when it can be accessed from outside the LATA in which the computer facility is housed...." The Commission must reject Sprint's (p. 18) and TRA's (pp. 11-12) contrary arguments. Clearly the Commission also must reject arguments that do not even rely on potential interLATA transmission. These include Voice-Tel's (p. 12) argument that all information services should be arbitrarily declared to be interLATA, and ITAA's (pp. 11-12) similar argument that BOCs should provide all information services only through separate affiliates. These approaches were never adopted in the past by the FCC or the MFJ Court, were not adopted by Congress, and should be rejected.

Mere potential to be interLATA, or a party's desire that a service be treated as interLATA, cannot make a service interLATA. If it could, there would be no intraLATA services, which would mean that BOCs could not have been providing service all these years.

In order to be interLATA, the service must involve a bundled interLATA telecommunications transmission component selected or provided by the BOC. Even that provision does not, by itself, make it interLATA. Necessary factors include whether the communication originates and terminates in different LATAs, and whether the end user consumer receives an interLATA benefit.

InterLATA information services involve actual, specific point-to-point communication, with the point in each LATA chosen by the end user for its own benefit.[4] If a BOC chooses a point in another LATA for placement of transmission or information service equipment, in order to make the service more efficient for the BOC, that does not make the service interLATA.

End-to-end interLATA service vs. BOC interLATA service—AT&T confuses the nature of the end-to-end communication for purposes of jurisdiction (*e.g.*, an *interexchange access service* is subject to FCC authority if the end-to-end communication is interstate) with the question of whether the BOC or BOC affiliate itself is providing an interLATA or intraLATA service. Accordingly, AT&T (p. 13) is wrong when, in the context of §§ 271 and 272, it states that an "information service is interLATA whenever interLATA transmission or *interLATA access* is a component of the service...." (emphasis added.) If providing interLATA access made a BOC service interLATA, the BOCs currently would not be able to provide interexchange access services.

MFJ waiver request—AT&T (n.16) is mistaken when it asserts that the Commission can "presume that if an MFJ waiver was previously sought or granted for the provision of a particular information service, that service is an interLATA information service." A waiver request may or may not relate to the service being an interLATA information service subject to §272. Prior to 1991, the information services prohibition

[4] The same principles apply to both telecommunications and information services. Section 3(21) of the 1996 Act defines "interLATA service" as "telecommunications between a *point* located in a local access and transport area and a *point* located outside such area." "Information service" means "the offering of a capability for generating, ... or making available information via telecommunications...." §3(20). "Telecommunications" is "the transmission, between or among *points specified by the user* of information.... §3(43). (emphasis added.)

required a waiver before a BOC could provide any information service, whether on an interLATA or intraLATA basis. Moreover, waivers that the MFJ Court granted did not necessarily require a separate affiliate. In addition, BOCs sometimes requested waivers because of uncertainty of the meaning of the Court's orders, without any admission that waivers were actually needed.

Internet access—Like AT&T, MFS (pp. 11 and 17) confuses the question of whether the end-to-end communication is interLATA with the question of whether the part of the communication provided by the BOC is interLATA. Accordingly, MFS (pp. 6-26, and 28) is wrong in arguing that Internet Access is always interLATA information service. MFS's (p. 17) tortured argument shows that it will go any length to stop BOC competition. MFS states: "[E]lectronic publishing is defined to *exclude* the services that are traditionally thought of as Internet services, including gateway services, e-mail, and navigational systems. Thus, by implication, the information services excluded from the definition of electronic publishing must be the types of services for which Congress intended to include in the broader collection of information services that require a separate subsidiary." (emphasis in original) This argument is nonsensical. If Congress wanted intraLATA Internet access services to be in a separate affiliate, it would have created a separate affiliate requirement for them.

Pacific Bell Internet ("PBI"), a subsidiary of Pacific Bell, provides Internet access service, without providing interLATA service. PBI sent out a "Notice For Interconnection" to the entire interexchange industry seeking carriers interested in offering their interLATA service on a complementary basis with its intraLATA service. When end users sign up for PBI's service, PBI explains that it does not provide interLATA service, but that they may choose to use an interexchange provider that has agreed to provide it, or may ask any other interexchange carrier to inform PBI that they wish to provide it.

MFS (p. 18) also is wrong in saying that Pacific Bell did not file with the FCC concerning Internet access. Pacific Bell filed amendments to its CEI plans for both videotex gateway services and electronic messaging services in order to expressly include

Internet access, and filed reply comments.[5] The FCC expressly addressed Pacific Bell's Internet access service, rejected arguments against it, and approved it.[6] The Commission expressly determined that Pacific Bell was correct to amend its CEI plans because "Pacific Bell's Internet access offering represents an application in which videotex gateway and electronic messaging services converge."[7]

Existing requirements—Some parties argue that existing unbundling and interconnection requirements of *Computer II*, *Computer III*, and *ONA* are inconsistent with or insufficient to implement §272 requirements for interLATA information services. We discuss in Part IV below why these parties are wrong and why the existing requirements are more than what is needed to implement §272.

C. The Commission Should Reject Proposals That Would Fail To Respect the Different Regulatory Treatment that Congress Afforded Different Categories of Information Services

Electronic publishing services—MCI (p. 21) is wrong that "a financial or proprietary interest" in the content of the information is enough, by itself, to make the service electronic publishing. We explained in our Comments (pp. 14-15) that "control" or a "financial interest" in the content of information is a necessary attribute of electronic publishing services, but is insufficient by itself to make a service an electronic publishing service.

MCI (p. 22) is correct that "[s]ome notion of electronic transmission is instinct throughout the 1996 Act; otherwise the Act would be rendered entirely meaningless." See §274(a). As YPPA (p. 4) explains, in order to be electronic publishing subject to the restrictions of §274(a) there must be both control of the information and dissemination via transmission over the BOC's, or its affiliate's, "basic telephone service." Use of the BOC's unbundled network elements in a service provided by another carrier is

[5] *See Bell Operating Companies Joint Petition for Waiver of Computer II Rules,* 10 FCC Rcd 13758, paras. 59-67 (1995).

[6] *Id.*

[7] *Id.*

not sufficient. In addition, the service must fit the definition of an information service, including the BOC's generation or alteration of the content of information of the types listed in, and not excluded from, the electronic publishing definition.

Contrary to ITAA's assertions (pp. 15-16), the extensive §274(h) definition of electronic publishing services draws a clear distinction between these services and other information services. In fact, the definition expressly excludes large groups of information services, including gateway services and electronic mail services. Accordingly, ITAA's recommendation that electronic publishing services and information services be treated as one and the same must be rejected as contrary to Congress's intent.

Telemessaging services—MCI (p. 21) and Sprint (n.12) are mistaken in their arguments that telemessaging services should be treated as information services under §272. Sprint demonstrates the fallacy of this argument by saying that "all" telemessaging services should be treated as information services. That would include live answering services, which may lack any of the qualities required in the definition of information services.[8] Congress provided separate regulations for telemessaging services. These services should not also be regulated as interLATA information services. Allowing voice mail and other telemessaging services to be offered on an integrated basis is sound public policy, as evidenced by the benefits that integration of these services has provided consumers.

III. The Operate Independently and Separate Employees Provisions Do Not Require the Imposition of Requirements and Restrictions Not Imposed by Congress (¶¶ 57-60, 62)

A. *"Operate Independently" Provides Guidance for Implementing the Other §272(b) Requirements*

Many commenters (*e.g.*, AT&T, pp. 19-24; MCI, pp. 23-27; Sprint, pp. 20-25; Time Warner, pp. 17-18; Excel, pp. 4-8; NJ DRA, pp. 2-6) recommend that the Commission use the §272(b)(1) requirement that a BOC's interLATA affiliate operate

[8] AT&T makes this same mistake. AT&T, n.13.

independently from the BOC as a hook on which to hang a wide variety of additional requirements and restrictions. Nothing in the 1996 Act suggests that Congress intended the Commission to add to the requirements that Congress imposed between BOCs and their separate affiliates. If Congress did not believe that the requirements it specified were adequate, it could have added others, as it did in §274, or it could have required the Commission to prescribe additional requirements, as it did in §276. Congress did neither. Instead, it carefully specified a set of requirements to apply between BOCs and separate affiliates under §272.

It is not necessary for the Commission to add requirements to §272 to give effect to the independent operation requirement. That requirement provides a focus, or purpose, in interpreting and implementing the other §272(b) provisions. It tells the Commission and the BOCs why the other provisions were put in place, and how to resolve issues that arise in implementing those other provisions.

The phrase "operate independently" is not new. It appears in the *Computer II* and cellular rules.[9] The Commission has not used it to impose additional requirements in those situations, and the Commission need not do so here. The Commission should consider the motives of those advocating the imposition of additional restrictions and requirements on the BOCs. Congress intended to create competition in the provision of interLATA service. The commenters seek to thwart that intention. The Commission should focus on the desires of Congress, not the anticompetitive desires of the commenters.

If the Commission decides, despite Congress' intentions, to add restrictions and requirements, it should not go further than those imposed in the *Competitive Carrier*[10] proceeding. Those safeguards, combined with the provisions of the 1996 Act, will provide more than sufficient protection against any perceived concerns arising from the existence of a separate affiliate providing interLATA services.

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[9] 47 C.F.R. §64.702(c); 64 C.F.R. §22.903(b).

[10] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 95 FCC 2d 554, (1983) (*Fifth Report and Order*).

B. The 1996 Act Does Not Prohibit Shared Services

Several commenters (AT&T, pp. 24-26; ITAA, p. 19; MCI, pp. 27-28; TIA, pp. 26-27) agree with the Commission's tentative conclusion regarding sharing of services by a BOC and its separate affiliate. They are wrong, and the Commission should rethink its tentative conclusion. Section 272(b)(3) requires the BOC and the separate affiliate to have separate officers, directors, and employees. It says nothing about shared services, and certainly does not prohibit shared services. The 1996 Act anticipates that there will be transactions between the BOC and the separate affiliate and provides guidelines for those transactions. §272(b)(5). The Commission's affiliate transactions rules provide further protection against improper cross-subsidies. No commenter provided any sound rationale for imposing a restriction on shared services that Congress did not impose.

Sharing services is not the same as sharing personnel. A BOC can provide services to itself and all of its affiliates, including a separate affiliate, using the BOC's employees, without sharing those employees with the affiliates. The BOC would charge the affiliates for the services provided, according to long-established and effective affiliate transactions rules. The *Computer II* rules permitted sharing of services, and no commenter identified any situation in which the sharing of services under those rules caused improper discrimination or cross-subsidy.[11] Until they can do so, there is no reason for the Commission to even consider imposing restrictions on the sharing of services.

There is even less basis for any restriction on a holding company or other affiliate from providing similar services to a BOC and a separate affiliate, as suggested by

[11] CCTA alleges that a NARUC audit of Pacific Telesis uncovered instances of cross-subsidization of competitive services, and that Pacific Bell failed to specify payment costs in its recent revisions to its Cost Allocation Manual ("CAM"). These allegations are not new -- CCTA has raised them before and we have addressed them. The NARUC audit report was filled with misinterpretations and outright errors. We showed in our response to the audit report that the accusations were either unfounded, or were extremely minor problems that have been corrected; in no case did the report identify any harm to Pacific Bell's ratepayers. *See Pacific Telesis Group's Response To The Draft Affiliate Interests Audit Report*, July 7, 1994. We also responded to CCTA's meritless allegation about our CAM. Pacific Bell's CAM fully complies with the Commission's rules. *Proposed CAM Revisions of Pacific Bell,* AAD 96-46, *Motion To Strike CCTA's Improper Reply Comments or In The Alternative To Accept Pacific Bell's Reply Comments,* AAD 96-46, filed June 20, 1996.

AT&T (p. 25), Sprint (p. 24), and Time Warner (pp. 19-20). Section 272 applies only between the BOC and the separate affiliate, and the definition of BOC does not include the holding company or other affiliates. The 1996 Act simply does not impose restrictions on other relationships within a corporation.

IV. The Commission Should Reject Proposals To Apply the Nondiscrimination Requirements Contrary to the Way Congress Established Them (¶¶ 65-89)

A. *The Nondiscrimination Provisions Require that the BOCs Provide Service, Not Guarantee an Outcome, in a Manner that Avoids Unreasonable Discrimination*

Nondiscriminatory provision of service—AT&T (p. 31) is wrong that "any failure by a BOC to achieve identical outcomes should be treated as *prima facie* evidence of discrimination." Sections 272(c)(1) and (e) do not require a BOC to provide a requesting entity with an identical outcome to that provided to its affiliate, where this would require the BOC to provide services to the requesting entity that are different from those provided to the affiliate. Ensuring equality of the end result on the other carrier's network would be impossible to do and to enforce. Unlike virtual collocation which involves a more narrow set of requirements, a general requirement that BOCs adjust services and processes for each carrier's order would raise infinite possibilities. The BOCs cannot be held responsible for the particular characteristics of other entities' networks and adjust all BOC processes and network characteristics accordingly. Although BOCs help requesting entities meet their needs, it is the requesting entities' responsibility to engineer their interconnection needs, based on sizing of trunk groups and signaling links, and based on their network architecture and customer base. For instance, if a carrier with many customers orders one small trunk group, some of its customers' calls probably will be blocked, whereas a carrier with few customers may suffer no blockage with the same trunk group. BOCs cannot guarantee the same end result, but must treat their affiliates the same as similarly situated third parties. As AT&T (pp. 32-33) appears to admit, if the other entity wants something different than the BOC's separate affiliate wants, the other entity should request something different, not try to force the BOC to figure out what the entity needs to get the same end result as the affiliate. AT&T's argument is convoluted since, after arguing that what matters is an identical outcome, not identical treatment, it argues that "'at minimum, ... BOCs must treat all other entities in the same manner as they treat their affiliates....'"

MCI (pp. 31 and 36) makes the same mistakes concerning the nature of the nondiscriminatory provision of service.[12] Moreover, MCI's (p. 37) goal clearly is to frustrate the BOC affiliates' abilities to innovate by urging the Commission to presume that any service a BOC affiliate wants that non-affiliates do not want is discriminatory.

Reasonable discrimination—MCI (p. 34-35) and Voice-Tel (pp. 13-14) are mistaken in their arguments that Congress intended to impose a stricter standard of compliance in §272(c)(1) than in §202. Unlike §251, which solely places obligations on LECs and others, §272 balances Congress's desire to protect ratepayers and competition with its desire to let BOCs into new businesses for the benefit of consumers. Thus, it is appropriate that §272 allows both regulators and BOCs more flexibility than §251.[13] They may continue to make distinctions among entities and services so long as disparate treatment is reasonable under the circumstances and BOCs offer similarly situated customers the same treatment.

No new regulations are needed to ensure against unreasonable discrimination. All the FCC's existing mechanisms continue in effect, including tariffing, comparably efficient interconnection, equal access, and others. How to apply these mechanisms in particular cases must be considered on an *ad hoc* basis.

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[12] Sprint (pp. 35-36) and TRA (pp. 15-16) also are wrong on this subject.

[13] MCI's position would result in §272 having a stricter standard than §251. MCI states that "differences in cost to a BOC would not appear to be relevant in assessing whether it must offer IXCs the same facilities and services on the same terms and conditions as it offers its affiliate." MCI, p. 35. In Docket 96-98, the FCC found that cost differences could be reflected without creating discrimination under §251. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order,* FCC 96-325, released August 8, 1996, para. 860.

B. *Section 272 Nondiscrimination Requirements Can Be Met by Extending Preexisting Safeguards, Although with Structural Separation the Full Panoply of Nonstructural Safeguards Is Not Needed*

Existing requirements—AT&T (p. 33) and MCI (pp. 37-38) are wrong to argue that existing requirements are insufficient to implement the §§272(c)(1) and 272(e) nondiscrimination requirements. Section 272(b) sets forth numerous structural separation requirements. The Commission has never required both structural separation and the *Computer III* nonstructural safeguards. Certainly these requirements are more than enough, without additional restrictions. The Commission should avoid the creation of new requirements that would destroy the balance created by Congress between providing protection and encouraging competition, in order to bring new benefits to the public.

MCI's argument (pp. 32-33) that existing requirements are insufficient, based on the Georgia MemoryCall proceeding, is without merit. The Georgia proceeding merely highlighted differences in regulatory policy between the FCC and Georgia. Contrary to Georgia, the FCC found that CEI safeguards were effective in preventing anticompetitive conduct in BellSouth's provision of MemoryCall service. The FCC preempted the state restriction against offering the service, and the Eleventh Circuit upheld the preemption.[14]

Similarly, Sprint's criticism (pp. 18-19) of ONA is misplaced. The reason that ESPs purchase few interstate ONA services is the ESP exemption from access charges, a "temporary" exemption established in 1983 when the enhanced service industry was considered to be in need of protection from "rate shock."[15] The exemption allows ESPs to use local, intrastate business services and avoid paying access charges that normally are required with interstate services. The ESPs' purchase of intrastate services, however, does not undermine ONA. The Commission established ONA based on both intrastate and interstate services, and the Commission approved the BOCs' ONA plans only when state

[14] *See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards,* CC Docket No. 90-623, 6 FCC Rcd 7571, 7623, n.211 (1991).

[15] *MTS and WATS Market Structure,* 97 FCC 2d 682 (1983).

tariffing methodologies met ONA standards.[16] Thus, contrary to Sprint, the ONA safeguards are effective regardless of whether ESPs purchase intrastate or interstate services.

Voice-Tel utterly fails to justify its proposal that structural separation apply to all information services. It is merely trying to stifle fair competition. For instance, Voice-Tel's allegation (p.8) is totally without merit that only BOCs' ESPs can obtain a unique dial tone to inform end users that a message is waiting. Consistent with ONA and CEI requirements, Pacific Bell's ESP purchases this Message Waiting Indicator service, for use on end users' lines, out of tariff like any other ESP, at the same prices, terms, and conditions.

Voice-Tel also ignores the ONA and CEI requirements in its other arguments. It states (pp. 3 and 6) that the BOC can devise means of favorable interconnection for its own enhanced service. This ignores the requirements that the BOCs' ESPs purchase services under tariff like all other ESPs. Voice-Tel (pp. 2-3 and 5) argues that BOCs will disclose network information to their affiliates and not to their nonaffiliates. This ignores the numerous network disclosure requirements. Similarly, Voice-Tel (pp. 4 and 7) makes unsupported allegations of BOC installation delays. Its bald allegations are contrary to the Commission's findings last year that the BOCs' nondiscrimination reports have not disclosed any discrimination and that BOC practices have brought no formal complaints before the FCC.[17]

The Commission already has addressed ATSI's concerns.[18] The ONA "120 Day Process" for ESP service requests meets ATSI's (pp. 12-13) proposals. CEI provides the equal access arrangements that ATSI (p. 12) requests. Price parity, including the FCC's "2 Mile Rule" provides the "comparable" cost that ATSI (p. 13) requests. The

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[16] *Filing and Review of Open Network Architecture Plans,* CC Docket No. 88-2, *Phase 1,* 4 FCC Rcd 1, paras. 283-339; 5 FCC Rcd 3103, paras. 79-88 (1990).

[17] *CI III Further Remand NPRM,* ¶29.

[18] ATSI (pp. 8 and 11-14) is improperly trying to bring ESPs into the §251 ILEC unbundling requirements that relate to requesting telecommunications carriers, not ESPs.

Commission repeatedly has rejected ATSI's (p. 13-14) request that BOCs be forced to collocate ESPs' equipment.[19]

LDDS's proposal (pp. 26-27 & n.46) that the Commission monitor earnings would not provide meaningful data. The Commission did not require this in *Computer II* and concluded that there was no need even for capitalization plans.[20] LDDS's proposal appears to be merely an attempt to acquire competitive information to gain an unfair advantage.

In sum, Sprint (p. 38) is correct when it states: "There would not appear any reason for the Commission to describe any non-accounting, nondiscrimination rules to implement these sections [272(c)(1) and 272(e)]. Any further definition can be left to individual cases." With the addition of the very stringent §272 structural separation requirements, which in *Computer III* the Commission recognized deny LECs economies of scope and scale, the Commission need not add additional requirements that will further reduce BOC efficiency and the resulting benefits to consumers.

<u>CPNI and information</u>—AT&T (p. 34) and MCI (p. 38) are wrong when they state that §272 governs access to CPNI by a BOC's separate affiliate and by third parties. Congress specifically and fully addressed CPNI issues in §222, and the Commission is establishing rules in CC Docket No. 96-115.[21]

The §272 requirement to provide information on a nondiscriminatory basis does not negate these §222 CPNI requirements. Accordingly, AT&T and MCI are wrong that §272 requires a BOC to provide CPNI to other entities whenever the BOC provides it to its separate affiliate. That would violate §222 either by requiring that the BOC provide

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[19] *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, *First Report and Order,* released August 8, 1996, ¶581 ("§251 Order"); *Expanded Interconnection with Local Telephone Company Facilities,* 9 FCC Rcd 2718, ¶35.

[20] *Computer III Remand Proceeding,* CC Docket No. 90-623, 6 FCC Rcd 7571, ¶73 (1991).

[21] The §222 CPNI requirements address Voice-Tel's (pp. 2, 9) unfounded allegations that BOCs gain an unfair advantage for their voice mail services from their customer relationships and knowledge of their services.

CPNI to other entities without written authorization, or by preventing the BOC from providing the CPNI to its separate affiliate in accord with the §222 requirements. Rather, the §272(c)(1) requirement means that the BOC must provide information in a nondiscriminatory manner, based on the same terms and conditions. This does not mean, as AT&T's argument would imply, that if a BOC solicits CPNI authorizations for its separate affiliate (via contract and meeting all accounting requirements) the BOC must solicit for all other entities as part of the same solicitation, or at the same time, and provide the authorizations to all entities or none. It would make no sense to make a blanket solicitation for all entities at once. That would require asking end users to authorize release of their CPNI to the world, and of course they would refuse. Instead, the requirement means that the BOC must respond the same way to similar requests from other entities, at the same prices, terms and conditions.

Concerning nondiscriminatory provisioning of network information, BOCs are subject to various network disclosure requirements, including the requirement in §251 for requesting telecommunications carriers. No new regulations are needed to implement the §272 requirement.

Procurement—TIA (pp. 33-34) is wrong when it argues that additional requirements are needed to implement the §272 provision concerning procurement. Congress established criteria in §273(e)(2). No additional requirements under §272 are needed. TIA also is wrong to include unregulated products, including CPE, in its proposed definition of goods and services subject to §272(c)(1) requirements. (TIA, p. 33). As part of Title II of the Act, §272(c)(1) is limited to regulating the BOC's and its affiliates' goods and services that are part of common carrier service.

Standards—MCI's argument (p. 39) is without merit that the FCC "should not recognize or acknowledge as nondiscriminatory standards those specifications developed in a closed, non-public, and/or proprietary process, such as Bellcore Technical and Generic Requirements." When Bellcore writes industry standards, it opens the process to all industry participants. For instance, when Bellcore developed the GR905-SS7 interface specifications, under which two networks can interconnect using SS7, Bellcore held public forums in which MCI, AT&T, Sprint, and numerous other carriers participated. Now §§273(d)(4) and (d)(5) establish the "reasonable and nondiscriminatory" procedures for Bellcore and other non-accredited standards development organizations to follow when they create and publish industry-wide standards and generic requirements for telecommunications equipment and CPE. No additional requirements are needed under §272.

MCI's (pp. 39-40) arguments also are without merit that the BOCs should be required to attend all public forums that develop standards and that BOCs improperly dominate forums. The BOCs voluntarily participate in standards setting forums, and there is no need to require them to do so. We fully rebutted MCI's unfounded assertions that BOCs dominate forums in our Reply Comments in the *Computer III Further Remand Proceeding*.[22] MCI is being disingenuous. On the one hand, it wants the Commission to force the BOCs to attend forums. (Its request for mandatory attendance makes it clear that if BOCs did not attend, MCI would complain that BOCs were frustrating the forum process.) On the other hand, MCI in effect complains that BOCs do attend, because it finds BOC attendance and participation to be dominance.

<u>The timing of provisioning</u>—AT&T's assertion (p. 36) that §272(e)(1) relates to "any conduct in fulfilling service requests" is without merit. As Sprint (p. 44) states, this section "refers only to equality 'in terms of timing.'"

Sprint states that this section "can perhaps best be enforced through reporting requirements." Sprint recommends requirements similar to "those required under ONA and ARMIS." Continuation of all these reporting requirements is unnecessary, but is certainly more reasonable than Teleport's (pp. 15-18) proposal. For instance, Teleport would require that BOCs report the prices, terms, and conditions of every service provided to affiliates. These reports would duplicate information in BOC tariffs and accounting reports, and provide no additional, useful information that is relevant to the timing

[22] *Reply Comments of Pacific Bell and Nevada Bell*, pp. 44-60, May 19, 1995.

requirement for service provisioning. If Teleport obtained non-public information about our separate affiliate's business, it would gain an unfair advantage at the expense of competition.

TRA's suggestion (pp. 17-18) to use averaged information is constructive because service provisioning times vary based on the size and complexity of the order and the geographic location. Accordingly, AT&T (p. 16) clearly is wrong that the "BOC's response time to any affiliate's request for an exchange or exchange access service is thus a mandatory maximum period for responses to any unaffiliated entity's request for any such service." This approach would not recognize installations that are simple because of the size of the order, the nature of the particular network arrangement, or the geographic location, as opposed to large, complex, or geographically remote installations. The BOC would be penalized for moving quickly on the former installations and, in fact, would be placed in an impossible situation of being required to duplicate the speed in all other situations. AT&T's attempt to hamstring the BOCs must be rejected.

Collocation—MFS (p. 28) asserts that "[i]f a RBOC information services affiliate collocated a router or server in the RBOC's central office, this section [272(e)(2)] of the Telecommunications Act appears to require that the RBOC make the same facilities and services available to a competing information service provider." Section 272(e)(2) has nothing to do with collocation of information service providers' equipment; collocation of equipment is not a service or facility subject to this section. Requiring physical collocation of third party equipment is a taking of property which must be expressly authorized by Congress.[23] Only §251(c)(6) authorizes physical collocation, and the Commission ruled in CC Docket No. 96-98 that this section does not require physical collocation of enhanced service equipment.[24] This decision is consistent with the Commission's earlier decisions in both the *Computer III* and *Expanded Interconnection* proceedings that collocation of enhanced service equipment is unnecessary for interconnection and should not be required.

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[23] *Bell Atlantic v. FCC,* 24 F.3d 1441 (D.C. Cir. 1994).

[24] *§251 Order*, ¶581.

The Commission's established CEI requirements ensure nondiscriminatory interconnection. MFS's assertion must be rejected as a feeble attempt to get yet another bite of the apple on this well-settled issue.

C. *Tariff Rates Satisfy the Requirements of Section 272(e)(3)*

AT&T suggests (pp. 39-40) that §272(e)(3)'s requirements cannot be satisfied by the BOC charging (or imputing to itself) a tariffed rate for telephone exchange and exchange access services. Instead AT&T suggests that the BOC must constantly monitor what prices unaffiliated carriers are paying for "like" exchange or exchange access services. By like, AT&T means a service that is "functionally equivalent" from the interexchange carrier's perspective to the service used by the BOC affiliate.

AT&T's proposal unnecessarily complicates the implementation of §272(e)(3). Tariffs assure that customers using the same service will pay the same price, according to the terms and conditions of the tariff. So long as the BOC and affiliate pay the tariff rate, the Commission can be assured they are not paying less than anyone else paying the tariff rate. Furthermore, §272(e)(3) refers to "such service" meaning the same service the BOC or affiliate is using. It does not refer to a different service that an interexchange carrier thinks is functionally equivalent. That would be nearly impossible to administer, subject to constant disputes about whether two services are functionally equivalent. A tariff makes it clear when the same services are being used.

D. *Section 272(e)(4) Is Not Limited to the Provision of Otherwise Authorized InterLATA Services (¶ 89)*

AT&T makes the astonishing argument (pp. 41-47) that §272(e)(4) does not authorize the BOCs to provide "wholesale" facilities and services to be used by interexchange carriers in their provision of interLATA services, suggesting instead that it permits only the provision of facilities and services related to interLATA services the BOCs are otherwise permitted to provide. According to AT&T, the provision of such facilities and services will benefit only resellers, and not the "national facilities-based long distance carriers", and that to do so would be in "direct competition" with the large